Intisari Mulia Engineering Sdn Bhd v TUV SUD (M) Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(C)(A)-538–04 OF 2023 AND W-02(C)(A)-539–04–2023
NANTHA BALAN, CHE MOHD RUZIMA AND SEE MEE CHUN JJCA
21 NOVEMBER 2024

Adjudication — Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') — Whether adjudicator had acted in excess of jurisdiction — Claimant failed to show it had written construction contract with respondent which related to 'construction work' as defined under s 4 of the CIPAA — Whether CIPAA could not apply to resolve claimant's dispute with respondent — Whether adjudicator had wrongly assumed jurisdiction to determine the dispute — Whether adjudication decision was improperly procured

The appeals herein were against the High Court's dismissal of the appellant's application under s 15 of the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') to set aside an adjudication decision ('AD') on its dispute with the respondent ('TUV') and the allowing of TUV's application under s 28 of the CIPAA to enforce the AD. TUV had filed an adjudication claim under CIPAA against the appellant ('Intisari') for payment of RM1,703,148.97 for work done under a construction subcontract. The parties did not have a written contract and TUV's claim was based solely on purchase orders, invoices, exchange of correspondences and part-payments made by Intisari. The adjudicator ruled that these pieces of evidence were sufficient to constitute a construction contract and decided the adjudication in favour of TUV despite Intisari's objection that the dispute could not be adjudicated under CIPAA because of the absence of a formal written construction contract within the meaning of s 2 of the CIPAA. The High Court upheld the AD and found that the adjudicator had not acted in excess of jurisdiction. Initisari's main ground in the instant appeals was that the adjudicator had no jurisdiction to adjudicate TUV's claim in the absence of a formal written contract between the parties.

Held, unanimously allowing both appeals and setting aside the decisions of the High Court:

(1) In order for CIPAA to apply, a claimant had to fulfill two elements — establish that there was a 'construction contract made in writing' and that the construction contract related to 'construction work'. TUV had failed to prove both elements in order to clothe the adjudicator with jurisdiction to hear TUV's claim against Intisari (see paras 12 & 62).

(2) Even though the courts could take an expansive, generous and liberal approach in interpreting the meaning of the phrase 'construction contract made in writing', TUV had to discharge the burden of proving that the contracts entered into with Intisari did exist and that the said contracts were 'construction contracts' per se. Then, for the second element, TUV had to prove that the 'construction contracts' were related to 'construction work' as exhaustively defined in s 4 of the CIPAA. From the evidence adduced before the adjudicator, no proper proof was brought by TUV in order to invite the application of CIPAA to its claims. TUV had improperly procured the AD since the adjudicator had acted in excess of his jurisdiction (see paras 62–63).

(3) TUV had not adduced an iota of evidence to show that the sums it claimed against Intisari were based on 'construction contracts' that were related to 'construction work' as defined in s 4 of the CIPAA. It was not mentioned anywhere in the AD that TUV's supply of manpower, equipment and consumables for NDT Inspection Services to Aker Solutions (M) Sdn Bhd under Contract No 1 or supply of manpower and equipment for UTTG & MPI to Air Products Malaysia Sdn Bhd under Contract No 2 were related to 'construction work' as defined under s 4 of the CIPAA. None of the evidence adduced, such as the purchase orders, invoices, debit notes and correspondences, described the nature of 'construction work' involved in the so-called contracts between TUV and Intisari (see paras 55 & 57–58).

[Bahasa Malaysia summary

Rayuan-rayuan di sini adalah terhadap keputusan Mahkamah Tinggi yang menolak permohonan perayu di bawah s 15 Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk mengenepikan keputusan adjudikasi ('KA') berhubung pertikaian dengan responden ('TUV') dan membenarkan permohonan TUV di bawah s 28 APAIP untuk menguatkuasakan KA tersebut. TUV telah memfailkan tuntutan adjudikasi di bawah APAIP terhadap perayu ('Intisari') bagi bayaran berjumlah RM1,703,148.97 bagi kerja-kerja yang telah dilaksanakan di bawah satu subkontrak pembinaan. Pihak-pihak tidak mempunyai kontrak bertulis secara formal dan tuntutan TUV hanya bersandarkan kepada pesanan pembelian, invois, pertukaran surat-menyurat dan sebahagian bayaran yang dibuat oleh Intisari. Adjudikator memutuskan bahawa keterangan tersebut adalah mencukupi untuk membentuk suatu kontrak pembinaan dan telah memutuskan adjudikasi tersebut memihak kepada TUV walaupun Intisari membantah bahawa pertikaian tersebut tidak boleh diputuskan melalui adjudikasi di bawah APAIP disebabkan ketiadaan kontrak pembinaan bertulis secara formal sebagaimana yang ditakrifkan di bawah s 2 APAIP. Mahkamah Tinggi telah mengesahkan KA dan memutuskan bahawa adjudikator tidak bertindak melampaui bidang kuasanya. Alasan utama rayuan semasa oleh

Intisari adalah bahawa adjudikator tidak mempunyai bidang kuasa untuk menentukan tuntutan TUV disebabkan ketiadaan kontrak bertulis secara formal antara pihak-pihak.

Diputuskan, sebulat suara membenarkan kedua-dua rayuan dan mengenepikan keputusan Mahkamah Tinggi:

(1) Untuk APAIP terpakai, pihak penuntut hendaklah memenuhi dua elemen — membuktikan bahawa terdapat 'kontrak pembinaan yang dibuat secara bertulis' dan bahawa kontrak pembinaan berkaitan dengan 'kerja pembinaan'. TUV telah gagal membuktikan kedua-dua elemen tersebut untuk memberikan bidang kuasa kepada adjudikator bagi mendengar tuntutan TUV terhadap Intisari (lihat perenggan 12 & 62).

(2) Walaupun mahkamah boleh mengambil pendekatan yang luas, murah hati dan liberal dalam mentafsir maksud frasa 'kontrak pembinaan yang dibuat secara bertulis', TUV tetap bertanggungjawab untuk membuktikan bahawa kontrak-kontrak yang dimeterai dengan Intisari benar-benar wujud dan bahawa kontrak-kontrak tersebut adalah 'kontrak pembinaan' sebenar. Seterusnya, bagi elemen kedua, TUV hendaklah membuktikan bahawa 'kontrak-kontrak pembinaan' tersebut berkaitan dengan 'kerja pembinaan' sebagaimana yang ditakrifkan secara menyeluruh di bawah s 4 APAIP. Berdasarkan keterangan yang dikemukakan di hadapan adjudikator, tiada bukti yang mencukupi telah dikemukakan oleh TUV bagi membolehkan pemakaian APAIP terhadap tuntutannya. TUV telah memperoleh KA tersebut secara tidak wajar memandangkan adjudikator telah bertindak melampaui bidang kuasanya (lihat perenggan 62–63).

(3) TUV tidak mengemukakan sebarang keterangan walau sedikit pun bagi menunjukkan bahawa jumlah yang dituntut terhadap Intisari adalah berdasarkan 'kontrak pembinaan' yang berkaitan dengan 'kerja pembinaan' sebagaimana yang ditakrifkan dalam s 4 APAIP. Ianya tidak dinyatakan di mana-mana dalam AD bahawa pembekalan tenaga kerja, peralatan dan bahan guna habis oleh TUV bagi Perkhidmatan Pemeriksaan NDT kepada Aker Solutions (M) Sdn Bhd di bawah Kontrak No 1 atau pembekalan tenaga kerja dan peralatan bagi UTTG & MPI kepada Air Products Malaysia Sdn Bhd di bawah Kontrak No 2 adalah berkaitan dengan 'kerja pembinaan' sebagaimana yang ditakrifkan di bawah s 4 APAIP. Tiada mana-mana keterangan yang dikemukakan, seperti pesanan pembelian, invois, nota debit dan surat-menyurat, yang menggambarkan sifat sebenar 'kerja pembinaan' dalam kontrak-kontrak yang dikatakan wujud antara TUV dan Intisari (lihat perenggan 55 & 57–58).]

Cases referred to

AJS v JMH and another appeal [2022] 1 MLJ 778, FC (refd)
Anas Construction Sdn Bhd v JKP Sdn Bhd and another appeal [2024] 2 MLJ 543; [2024] 2 CLJ 665, FC (refd)
Ancubic Construction Sdn Bhd v Cedy Third Contracting and Trading (M) Sdn Bhd and another case [2023] MLJU 1204, HC (refd)
Application of Tan Boon Liat @ Allen, Re; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 2 MLJ 83 (refd)
Bina MYK Sdn Bhd v VVO Construction Sdn Bhd [2017] MLJU 2080, CA (folld)
Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)
Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors [2000] 4 MLJ 96; [2000] 3 CLJ 748, CA (refd)
Crawford v Spooner (1846) 6 Moo PC 1, PC (refd)
Dovey and the Metropolitan Bank (of England and Wales), Limited v John Cory [1901] AC 477, HL (refd)
Duport Steels Ltd & Ors v Sirs & Ors [1980] 1 WLR 142, HL (refd)
Euroland & Development Sdn Bhd v Tack Yap Construction (M) Sdn Bhd [2018] MLJU 861, HC (refd)
Fothergill v Monarch Airlines [1980] 3 WLR 209, HL (refd)
Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd [2016] MLJU 1054; [2016] AMEJ 2209, HC (refd)
Innovatif Engineering (M) v Nomad Engineering Sdn Bhd [2016] MLJU 1920; 2017 AMR 722, HC (refd)
Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases [2021] MLJU 1889; [2021] 1 LNS 1620, HC (refd)
Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor [2024] 3 MLJ 544, FC (refd)
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)
London Transport Executive v Betts (Valuation Officer) [1959] AC 213, HL (refd)
Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224, FC (refd)
MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and another case [2021] MLJU 1795, HC (folld)
Ong Teik Beng (t/a MJV Construction) v Wow Hotel Sdn Bhd and another case [2022] 8 MLJ 10, HC (refd)
Poly Ritz Ventures Sdn Bhd v Vestland Resources Sdn Bhd and another case [2020] MLJU 2061, HC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd [2002] EWCA Civ 270, CA (refd)
Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara [2000] 4 MLJ

A 167; [2000] 3 CLJ 659, CA (refd)
Tan Kim Chuan & Anor v Chandu Nair [1991] 2 MLJ 42, SC (refd)
Tan Weng Chiang v PP [1992] 2 MLJ 625, SC (refd)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the
B *estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721, FC (refd)
Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case [2017] MLJU 242, HC (refd)
Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case [2017] MLJU 146, HC (folld)
C

Legislation referred to

Building and Construction Industry Security of Payment Act 2004 [SG] s 4, 4(4), (5)
Construction Industry Payment and Adjudication Act 2012 ss 2,
D 4, 5(1), 9, 15, 15(b), (c), (d), 28, 32(d), Schedule 1
Housing Grants, Construction and Regeneration Act 1996 [UK] s 107
Interpretation Acts 1948 and 1967 ss 3, 15
Local Democracy, Economic Development and Construction Act 2009 [UK] s 139
E

Appeal from: *Tuv Sud (Malaysia) Sdn Bhd v Intisari Mulia Engineering Sdn Bhd and another case* [2023] MLJU 1205 (High Court, Kuala Lumpur)

Hussin bin Mohd (with Mohammad Hafizzuddin bin Basri) (Mohd Irwan Mohd
F *Mubarak) for the appellant.*
So Chien Hao (with Wong Wai Sam) (WS Wong & Co) for the respondent.

Che Mohd Ruzima JCA:

G INTRODUCTION

[1] By consent of the parties, the High Court heard two separate applications together. First, the application by TUV SUD (M) Sdn Bhd ('TUV') pursuant to s 28 of the Construction Industry Payment and
H Adjudication Act 2012 ('the CIPAA') in Originating Summons No WA-24C-129–06 of 2022 ('OS 129') to enforce the adjudication decision ('AD') dated 27 May 2022 ('enforcement application') by the learned adjudicator ('LA') and second, the application by Intisari Mulia Engineering Sdn Bhd ('Intisari') pursuant to para 15(b), (c) and/or (d) of the CIPAA via OS
I No WA-24C-146–07 of 2022 ('OS 146') to set aside the AD ('setting aside application').

[2] After having considered the cause papers and written submissions by the parties, the learned High Court judge ('LHCJ') dismissed Intisari's setting

aside application via OS 146 with cost of RM6,000 and allowed TUV's enforcement application via OS 129 with cost of RM4,000. Aggrieved by the aforesaid decisions, Intisari appealed. Appeal against OS 129 decision for enforcement application is registered as Appeal Case No W-02(C)(A)538–04 of 2023 ('Appeal 538') and appeal against OS 146 decision for setting aside application is registered as Appeal Case No W-02(C)(A)539–04 of 2023 ('Appeal 539').

[3] Before us, both Appeal 538 dan Appeal 539 were heard together and decided together.

BRIEF BACKGROUND FACTS

[4] The background facts for TUV's enforcement application and Intisari's setting aside application as narrated by the LHCJ in her grounds of judgment ('GOJ') are as follows:

> [7] Aker Solutions Malaysia Sdn Bhd ('main contractor 1') had appointed TUV for the supply of manpower, equipment and consumables for NDT inspection services for Aker Solutions (M) Sdn Bhd at PFKZ Port Klang, Selangor ('project 1'). Intisari then appointed TUV as its sub-contractor for the works in respect of project 1.
>
> [8] Apart from that, Air Products Malaysia Sdn Bhd ('main contractor 2') had also appointed TUV for the 'supply of manpower and equipment UTTG & MPI for Air Products Malaysia Sdn Bhd' ('project 2'). Similarly, Intisari subsequently appointed TUV as its sub-contractor for the works for project 2.
>
> [9] The contracts between TUV and Intisari were claimed to be founded on purchase orders dated 22 May 2018 for project 1 and purchase orders dated 21 July 2020 and 7 March 2020 for project 2, respectively.
>
> [10] According to TUV, the parties had agreed that Intisari would send invoices to main contractor 1 and main contractor 2 for the works done by TUV. Upon receipt of the payments for work done, Intisari would remit 95% out of the same to TUV and retain 5% as its commission.
>
> [11] TUV claimed that it has completed the works for main contractor 2 whilst for main contractor 1, works commenced in September 2018 and was completed on a stage-by-stage basis, both in accordance with the instructions of Intisari and the main contractors, respectively, from time to time.
>
> [12] TUV sent several invoices to Intisari for payment of 95% of the total value of works done, however, it did not receive any payment from Intisari.
>
> [13] This led TUV to issue a payment claim on 4 October 2021 claiming the total sum outstanding as at that date ie RM1,703,148.97. The payment claim was served on Intisari at its registered address on 7 October 2021 (see para 2 in the notice of adjudication and para 15 in the adjudication claim) but it chose not to submit a payment response.
>
> [14] On 1 November 2021, TUV issued a notice of adjudication and this was

followed with several correspondences between TUV's solicitors and the Asian International Arbitration Centre ('AIAC') as to the existence of a 'construction contact made in writing relating to construction work' within the meaning of s 2 of the CIPAA.

[15] For present purposes, suffice to say that, on 17 February 2022, Mr Sivabalan Sankaran accepted the appointment as the adjudicator.

[16] TUV then issued the adjudication claim on 7 March 2022. Intisari did not submit an adjudication response as it took the position that, as no agreement in writing was concluded, s 2 of the CIPAA is not fulfilled. There is similarly extensive correspondences between the solicitors who represented the parties in the adjudication proceedings and the adjudicator as to Intisari's objection for the dispute to be heard via adjudication under the AIAC (refer to the letters and emails as exhibited in the parties' affidavits).

[17] On 10 June 2022, the adjudicator released his decision dated 27 May 2022 to the parties whereby he determined that:

> 59. ...
>
> (a) IMESB, the respondent shall pay TUVSSB, the claimant the sum of RM1,703,148.97 on or before 10 June 2022;
>
> (b) IMESB, the respondent shall bear the costs of TUVSSB, the claimant in the sum of RM10,000 which shall be paid on or before 10 June 2022.
>
> (c) In default of payment of A above, IMESB shall pay simple interest of 5%pa from 11 June 2022 until full settlement on the sum of RM1,703,148.97.
>
> (d) IMESB, the respondent shall bear the full costs of this adjudication. These costs shall include RM27,257.80 being the adjudicators fee and RM5,746.85 being AIAC's administrative fees ...

ISSUES BEFORE THE LHCJ

[5] The LHCJ identified and addressed five issues raised by Intisari to set aside the AD. Those issues are as follows:

(a) whether there is a written contract between TUV and Intisari as required under sub-s 5(1) of the CIPAA;

(b) whether there is a due date for the amount claimed by TUV;

(c) whether there is a cause of action in the adjudication claim which allows TUV to claim against Intisari in the adjudication proceedings;

(d) whether the adjudicator has acted beyond the power and/or jurisdiction under the CIPAA; and

(e) whether the adjudicator has breached the second rule of natural justice

by not allowing Intisari's application to file the adjudication response. A

THE LHCJ'S FINDINGS

[6] For the first issue, the LHCJ referred to previous High Court's decisions in *Innovatif Engineering (M) v Nomad Engineering Sdn Bhd* [2016] MLJU 1920; 2017 AMR 722, *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case* [2017] MLJU 146 (*Zana Bina*'s case), *Poly Ritz Ventures Sdn Bhd v Vestland Resources Sdn Bhd and another case* [2020] MLJU 2061, *Ong Teik Beng (t/a MJV Construction) v Wow Hotel Sdn Bhd and another case* [2022] 8 MLJ 10, AIAC CIPAA Circular 03 ('ACC 3') which was previously issued as KLRCA CIPAA Circular 03, and upon examination of all relevant documents before the LA the LHCJ is satisfied that the essential elements of contract have been established. The LHCJ concluded that the courts have thus far leaned towards an expansive and generous interpretation of the words 'construction contract made in writing' in s 2 of the CIPAA, and therefore Intisari's contention that the dispute cannot be adjudicated for the reason that there is no written contract between TUV and Intisari is unmeritorious. B C D

[7] The LHCJ addressed the second and third issues together. The LHCJ considered Intisari's contention that there is no due date on the amount claim and TUV failed to produce any document on the due date. The LHCJ also considered Intisari's submission that TUV's payment claim does not have a cause of action as it was based only on invoices without referring to any provision in the construction contract. Per contra, TUV refuted Intisari's contention and argued that Intisari only raised the issue for the first time during the setting aside application. TUV submitted that the validity of its payment claim falls within the competency and jurisdiction of the LA to determine, and the court cannot set aside the AD unless the LA has breached s 15 of the CIPAA. TUV insisted that it is the wrong forum for Intisari to raise the issue of validity of the payment claim for the first time in court and this constitutes an invalid reason to set aside the AD. In her finding, the LHCJ is in agreement with TUV's argument that the jurisdictional challenge on the due date of payment and cause of action is unfounded. E F G H

[8] On the fourth issue, the LHCJ found that the LA has not acted beyond the power and/or jurisdiction under the CIPAA since there is no evidence to support Intisari's claim that the LA had decided based on the draft agreement attached in the adjudication claim. Thus, the allegation that the LA had acted in excess of jurisdiction is unsubstantiated. I

[9] Finally, on the fifth issue, the LHCJ found that:

(a) the LA had promptly replied to Intisari's application to file the

A adjudication response out of time either on the same day or on the next day;

(b) the LA had evidently given due consideration to each application by Intisari and had decided to reject them with reasons;

B (c) the manner in which the LA had conducted the adjudication proceedings shows that he is aware of the duty and obligation to comply with the principles of natural justice, and concurrently to ensure that his decision is delivered within the time frame;

C (d) there is certainly no lack of effort on the part of the LA in accordance with procedural fairness to the parties, however the task was made difficult by Intisari itself and its counsel;

(e) Intisari flagrantly ignoring and continuously defying the adjudicator's directions and reminders; and

D

(f) Intisari's failure to file the adjudication response within the timeline set by the LA was at its own peril, leaving the LA no choice but to decide the dispute.

E

Therefore, the fifth ground of challenge in the setting aside application is completely devoid of merit and must be rejected.

THE APPEAL

F

[10] In the memorandum of appeal ('MOA'), Intisari advanced the following four grounds in its appeal against the LHCJ's decision:

(a) the LHCJ erred in fact and/or law in failing to consider that the LA does not have jurisdiction to adjudicate the claim where no written contract has been entered into between the parties;

G

(b) the LHCJ erred in fact and/or law by taking into consideration CC 03 in her decision;

H (c) the LHCJ erred in fact and/or law in failing to consider that there is no due date pleaded in the payment claim and the LA has breached s 15(3) of the CIPAA; and

(d) the LHCJ has erred by not taking into consideration all the objections raised by Intisari with regards to lack of jurisdiction on the part of the LA to hear and/or to proceed with the proceedings, and by not considering the Intisari's comments on the statement of account filed by TUV.

I

OUR DECISION

[11] Before us, the crux of Intisari's arguments and TUV's counter arguments evolved around the main issue that is, whether the LA has jurisdiction to adjudicate and later decide on the adjudication claim filed by TUV where there is no formal contract in writing entered into between the parties. Based on those arguments, we are of the view that the first, second and the first part of the fourth grounds advanced by Intisari in its para (a), (b) and (d) of the MOA are to be first determined and decided together.

[12] To begin with, the law related to the payment claim by a claimant under CIPAA is trite. Any claimant who wishes to file a payment claim must establish the existence of a construction contract. For ease of reference, the applicability of the CIPAA as provided under s 2 is as follows:

> 2 Application
>
> This Act applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government.

Premised on the said provision, it is obvious that the law requires a claimant must fulfil two elements. First, the claimant must establish that there is a 'construction contract made in writing' and second, 'the construction contract must relate to construction work carried out wholly or partly within the territory of our country'.

[13] In the present appeal before us, the troubling issue is related to the first element, that is, what constitutes a 'construction contract made in writing'. Unfortunately, there is no definition assigned or any further elaboration provided to the words 'contract made in writing' in CIPAA. Be that as it may, there is a definition for 'construction contract' in its interpretation under s 4 of the CIPAA as follows:

> 'construction contract' means a construction work contract or construction consultancy contract;

Meanwhile, the definition of 'construction work' under the same interpretation section is as follows:

> 'construction work' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of —
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

A (b) any road, harbour works, railway, cableway, canal or aerodrome;

(c) any drainage, irrigation or river control work;

(d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or

B (e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work,

and includes —

C (A) any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earth-moving, excavation, laying of foundation, site restoration and landscaping; and procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

D (B) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

E **[14]** As to the existence of a formal written contract between the parties in relation to TUV's payment claim against Intisari before the LA, it is undisputed that there is none. TUV has admitted that their claim is only based on the documents, that are, purchase order and invoices, exchange of correspondences and conduct of the parties which include the partial payments made by Intisari.

F **[15]** Upon deliberation and consideration on the issue raised before him by Intisari on the existence of a 'construction contract in writing', the LA made the following finding at para 50 of his AD:

50. Whether there is a construction contract in writing?

G – in light of the provisions of Circular 3 and the decision on *Innovatif Engineering (M) v Nomad Engineering Sdn Bhd* [2017] AMR 722, I find there is a construction contract based on the exchange of correspondence, issuance of PO and invoices and partial payments made and exchanged between the parties.

H From the said finding, it is obvious that the LA himself acknowledged that there is no formal written contract entered into by the parties and yet made a finding that there is a 'construction contract' based on the contemporaneous documents and also the conduct of the parties.

I **[16]** Meanwhile, the LHCJ also made the same observation as to the existence of a written contract between the parties in TUV's payment claim against Intisari before the LA. At para [29] of the GOJ, the finding of the LHCJ is as follows:

[29] The statements forming the basis of TUV's claim against Intisari in the

payment claim is as per paras 7, 8, 10, 11 and 12 above. There is obviously no written agreement or contract signed by both parties.

The LHCJ then refers to three previous High Court decisions in *Zana Bina Sdn Bhd v Cosmic Master Development Sdn Bhd and another case* [2017] MLJU 146 (*Zana Bina*'s case), *Poly Ritz Ventures Sdn Bhd v Vestland Resources Sdn Bhd and another case* [2020] MLJU 2061 (*Poly Ritz Ventures*' case) and *Ong Teik Beng (t/a MJV Construction) v Wow Hotel Sdn Bhd and another case* [2022] 8 MLJ 10 (*Ong Teik Beng*'s case), and made the following findings in her GOJ:

> [44] In the light of the above-mentioned case authorities, Intisari's contention that the dispute cannot be adjudicated for the reason that there is no written contract between TUV and Intisari is unmeritorious. The court in *Poly Ritz Ventures* and *Ong Teik Beng* have held that purchase orders and quotations can constitute a contract.
>
> [45] The adjudicator had relied on Circular CIPAA 03 issued by the then Kuala Lumpur Regional Centre for Arbitration and the case of *Inovatif Engineering* in finding that there is a construction contract based on the exchange of correspondence, the issuance of purchase orders and invoices and the partial payments made between the parties. The supporting documents referred to by the adjudicator were exhibited for purposes of the setting aside application namely, the purchase orders, invoices, daily and weekly time sheets, credit notes, statement of account and other documents. Intisari had sent the purchase orders dated 22 May 2018 for project 1 and purchase orders dated 21 July 2020 and 7 March 2020 for project 2, respectively, to TUV. Upon examination of these documents, the court is satisfied that the essential elements of contract have been established.
>
> [46] Consistent with the current approach in the interpretation of the phrase 'construction contract made in writing' in s 2 of the CIPAA, to which Intisari has not provided any cogent reason for this court to take a different view, the absence of a written agreement or contract does not automatically exclude the application of the CIPAA. The court finds and holds that Intisari has not proven the first ground to set aside the AD, on a balance of probabilities.

The first element — Construction contract made in writing

[17] After hearing the arguments on this main issue, we invited the learned counsel for the parties to file further submissions on the said main issue. In the further submission, the learned counsel for Intisari referred to the statutory adjudication in the United Kingdom ('UK') which was governed by Housing Grants, Construction and Regeneration Act 1996 ('the HGCRA'). He submitted that by virtue of s 107 of the HGCRA, the court in UK took a strict and literal interpretation approach whereby the definition of 'construction contract made in writing' was confined within the four walls of the agreement in writing as decided by the Court of Appeal in *RJT Consulting Engineers Ltd v DM Engineering (Northern Ireland) Ltd* [2002] EWCA Civ 270 (*RJT*'s case). It was argued that the strict approach changed when the legislature in the UK

decided to repeal s 107 of the HGCRA in the year 2011 by virtue of s 139 of Local Democracy, Economic Development and Construction Act 2009. Hence, s 107 which defined 'construction contract made in writing' was no longer in force.

[18] It was further argued that in light of the *RJT*'s case and the repeal of s 107 of the HGCRA in UK, CIPAA had to be amended first before interpreting the definition 'construction contract in writing' in an expansive approach since it was never the intention of the parliament. Had the parliament intended for CIPAA to be construed in that way hence, the wordings of the CIPAA will surely be aligned with the wordings of HGCRA as CIPAA was passed in 2012 which is post the amendment of HGCRA in 2011.

[19] Then, the learned counsel for Intisari referred to the law governing statutory adjudication in Singapore under the Building and Construction Industry Security of Payment Act 2004 ('the BCISPA') specifically to sub-ss 4(4) and (5) of the BCISPA which provide as follows:

> (4) For the purpose of this section, a contract is treated as being made in writing —
>
> (a) if the contract is made in writing, whether or not it is signed by the parties to the contract;
>
> (b) if the contract is made by an exchange of written communications;
>
> (c) if the contract made otherwise than in writing is recorded by one of the parties to the contract, or by a third party, with the authority of the parties to the contract; or
>
> (d) if the parties to the contract agree otherwise than in writing by reference to terms that are in writing.
>
> (5) Where a contract is not wholly made in writing, the contract is treated as being made in writing for the purpose of this section if, subject to the provisions of this Act, the matter in dispute between the parties to the contract is in writing.

It was submitted that the High Court of Singapore had interpreted 'construction contract made in writing' by referring to the express provision of s 4 of BCISPA. In our jurisdiction, CIPAA has never had such an express provision despite the fact that CIPAA was enacted in 2012 which is eight years after BCISPA. Had Parliament intended for the expansive approach like Singapore with regard to the definition 'construction contract made in writing', surely the CIPAA would have been drafted in the same manner as BCISPA. Thus, it was submitted that this court should not take the same position as in UK and Singapore.

[20] As to the ACC 03, it was argued that the circular issued by AICC is not legally binding since CIPAA did not provide any provision or authority for AIAC to issue such circular hence rendering the ACC 03 to be a mere guideline

for the adjudicator. It was further argued that even though the LHCJ has attempted to give a wide and liberal interpretation to the definition 'construction contract made in writing' by referring to the ACC 03 and *Zana Bina*'s case, the LHCJ failed to appreciate that the ACC 03 does not have a legal binding effect but only a mere guideline. Therefore, the interpretation of 'construction contract made in writing' should be given its clear and literal meaning since had the Parliament intended the definition to be as extensive as the ACC 03, the parliament surely will legislate it so as there have been numerous provisions in other countries that have been provided as such.

[21] The learned counsel for Intisari concluded that without a clear provision under CIPAA, it is insufficient for only a part of the agreement to be recorded in writing but instead the whole agreement must be put in writing before the matter can be heard and tried in adjudication proceedings. As such, purchase orders or invoices do not comply with s 2 of the CIPAA and cannot be relied on in the adjudication as a construction contract made in writing.

[22] On the other hand, learned counsel for TUV referred to High Court decision in *Integral Acres Sdn Bhd v BCEG International (M) Sdn Bhd and other cases* [2021] MLJU 1889; [2021] 1 LNS 1620 on the object and purpose of CIPAA, and the dissenting judgement in the Federal Court decision in *Anas Construction Sdn Bhd v JKP Sdn Bhd and another appeal* [2024] 2 MLJ 543; [2024] 2 CLJ 665 which emphasised that CIPAA is a different regime from civil court litigation and the court should not take a pedantic technical approach without proper and due regard to the whole scheme, the intent of CIPAA, its operation, and its application in order to avoid any misdirection. It was submitted that in the construction industry, an over technical approach that all construction contracts must be in writing will result in cumbersome, technical and costly approach in adjudication proceedings which defeats the object of CIPAA, and the courts should not allow their hand to be tied down by a narrow and strict interpretation of s 2 of the CIPAA.

[23] As regard to ACC 03, learned counsel for TUV submitted that AIAC in exercising its function under s 32(d) of the CIPAA, namely 'any functions as may be required for the efficient conduct of adjudication under the Act', issued ACC 03 to provide clear guidance and definition as to what the phrase 'construction contract made in writing' means. By issuing ACC 03, AIAC is discharging its statutory function to ensure that parties to a construction contract are guided as to whether or not payment disputes arising under their contract can be referred to adjudication under CIPPA. It further eliminates the need for the adjudicator who may not be legally trained to grapple with the complexity of the issue whether a construction contract is in writing. Based on the High Court decision in *Ancubic Construction Sdn Bhd v Cedy Third Contracting and Trading (M) Sdn Bhd and another case* [2023] MLJU 1204 and

A *Gazzriz Sdn Bhd v Hasrat Gemilang Sdn Bhd* [2016] MLJU 1054; [2016] AMEJ 2209, learned counsel for TUV conceded that ACC 03 is administrative or advisory in nature and not binding. However, from the analysis of the local decided cases so far, there is no prohibition imposed by the courts upon the parties from referring to and be guided and assisted by ACC 03, and in fact,
B ACC 03 has been widely referred to and applied by the High Courts in many cases, with the aim to achieve the spirit of CIPAA to ensure continuous cashflow among the subcontractors who are relying on speed and informality of the adjudication proceedings.

C

[24] On the interpretation and treatment of s 2 of the CIPAA together with Circular 03 in the context of statutory adjudication, learned counsel for TUV referred to the Federal Court decision in *Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor* [2024] 3 MLJ 544 (*Julian Chong Sook Keok*'s case) and *Tebin*
D *bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721 and concluded that the definition of construction contract in writing by reading s 2 of the CIPAA along with ACC 03 must be applied holistically in the context of CIPAA and the adjudication
E proceeding, with the object and purpose of CIPAA in mind.

Interpreting the phrase 'construction contract made in writing'

[25] One of the most substantial or principal duty of the judiciary is the
F interpretation of the statutes or laws which are in force. The courts in delivering justice in a legal dispute, have to strictly decide within the boundaries set by the legal framework which may include a plethora of legislation. Interpretation of statutes is a process commonly adopted by the courts for determining the exact intention of the legislature based on the correct understanding of the law. The
G objective of the courts is not only merely to read the law but is also to apply it in a meaningful manner to suit from case to case. It is also used for ascertaining the actual connotation of any Act or document with the actual intention of the legislature.

H

[26] There are plethora of cases under the common law that laid the principles on the interpretation of the statute. Among others, in *Crawford v Spooner* (1846) 6 Moo PC 1 at p 670:

I > We cannot aid the legislature's defective phrasing of an Act, we cannot add and mend, and, by construction, make up deficiencies which are left there.

In *Dovey and the Metropolitan Bank (of England and Wales), Limited v John Cory* [1901] AC 477 at para 488, Lord Macnaghten said:

> ... I do not think it desirable for any tribunal to do that which Parliament has abstained from doing — that is, to formulate precise rules for the guidance or embarrassment of businessmen in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and speaking for myself, I rather doubt the wisdom of attempting to do more.

Lord Denning in *London Transport Executive v Betts (Valuation Officer)* [1959] AC 213 at p 247 said:

> The judges have no right to fill in gaps which they supposed to exist in an Act of Parliament, but must leave it to Parliament itself to do so; see *Magor and St Mellons Rural District Council v Newport Corporation* [1952] AC 189; [1951] All ER 839. No court is entitled to substitute its words of the Act (see *Goodrich v Paisner and others* [1957] AC 65; [1956] 2 WLR 1053 at p 88). ... the business of the courts is to see what Parliament had said, instead of reading into an Act what ought to have been said (per Lord Coleridge CJ in *R v Mansel Jones* (1889) 23 QBD 29 at p 32.

In *Fothergill v Monarch Airlines* [1980] 3 WLR 209 at p 221, Lord Diplock said:

> The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament'; but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or, to use the concept often cited by the European court, the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible. The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.

In *Duport Steels Ltd & Ors v Sirs & Ors* [1980] 1 WLR 142 Lord Diplock said this at p 157:

> ... the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution, it is Parliament's opinion on these matters that is paramount.
>
> ...
>
> It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation, provide their own preferred amendments to statutes which experience of their operation has shown to have had consequences that members of the court before whom the matter comes consider to be injurious to the public interest.

[27] Back to our jurisdiction, our apex court adopted the same stand where the intention of the legislature is paramount consideration. See Supreme Court decision in *Tan Weng Chiang v Public Prosecutor* [1992] 2 MLJ 625 at p 630; Federal Court decision in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at p 188; *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 at p 44; *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at pp 218–219; and *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 at p 352.

[28] In the development of law on the interpretation of statute, 'mischief rule' is considered as a canon of interpretation. Although rarely used, much of the 'mischief' can be discerned in the preamble of the statute. In *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 2 MLJ 83, Abdoolcader J said that: 'The preamble undoubtedly throws light on the intent and design of the enacting authority and indicates the scope and purpose of the legislation itself but it should not be read as a part of a particular section of that written law'. Be that as it may, s 15 of the Interpretation Acts 1948 and 1967 now provides that the preamble shall be construed and have effect as if it were a part of the Act. In addition to the usage of preambles, Gopal Sri Ram JCA (as His Lordship then was) in *Citibank Bhd v Mohamad Khalid bin Farzalur Rahaman & Ors* [2000] 4 MLJ 96; [2000] 3 CLJ 748 stated that the courts have in recent years extended the rule beyond the common law position at the time of the passing of an Act to include 'the whole state of the law at the time an Act was passed to see the mischief it sought to cure'. Consequently, the mischief rule has been extended and is nowadays known as a purposive approach.

[29] In *Syed Mubarak bin Syed Ahmad v Majlis Peguam Negara* [2000] 4 MLJ 167 at pp 174–175; [2000] 3 CLJ 659 at pp 662–663, Gopal Sri Ram JCA said that:

> Now, it is true that a literal interpretation of s 30(1)(c) would produce the meaning contended for by the appellant. But if you look at the decisions of our courts over the past few years, you will notice that we no longer resort to the literal rule when interpreting statutes. We will not use it when it will produce an absurd result. Neither will we use it if it does not advance the aim or object of a statute. Indeed, parliament has noticed the change in our attitude and given express effect to it in s 17A of the Interpretation Acts 1948 and 1967. That section reads:
>
> > 17A. In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
>
> It is interesting to note that in England too the courts have preferred the purposive approach to other guides to construction. In *Carter v Bradbeer* [1975] 3 All ER 158, Lord Diplock made some observations of general importance that merits recall. He said (at p 161):
>
> > A question of statutory construction is one in which the strict doctrine of precedent can only be of narrow application. The ratio decidendi of a judgment as to the meaning of particular words or combinations of words used in a particular statutory provision can have no more than a persuasive influence on a court which is called on to interpret the same word or combination of words appearing in some other statutory provision. It is not determinative of the meaning of that other provision. This is because the inherent flexibility of the English language may make it necessary for the interpreter to have recourse to a variety of aids or canons of construction, which are not merely lexicographical, in order to select from what may be a number of different meanings which the words as a matter of language are capable of bearing, the precise meaning in which the legislature intended them to be understood. Canons of construction may prove to be conflicting guide posts: they may point different ways. Fashions in parliamentary draftsman ship and the attitude of the legislature toward innovations in established law are not unchanging. Such changes as have taken place are properly reflected in the relative importance to be attached to the guidance given by competing canons of construction which point in different ways. If one looks back to the actual decisions of this House on questions of statutory construction over the past thirty years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.
>
> > Changes in the judicial approach to questions of statutory construction are not the result of some specific decision of your Lordships' House identifiable as a landmark in this field of law. They have been fostered by the influence, persuasive and pervasive, of the similarity of reasoning to be found in the judgments of individual judges even though they may differ as to the result of applying that reasoning to the particular words of the particular statute which is under consideration in the case. The persuasive reasoning which involves a

reformulation of particular canons of construction or consideration of the circumstances which affect the relative weight to be attached to them, does not depend on whether the author of the judgment is among the majority or the minority as respects the actual decision in the case.

[30] In *AJS v JMH and another appeal* [2022] 1 MLJ 778, the Federal Court laid down that the standard canon of interpretation has always been that the court should, in usual cases, begin with the literal rule and the purposive rule ought only to be relied on where there is ambiguity. Meanwhile, in a recent decision in the case *Julian Chong Sook Keok*'s case, the Federal Court took the following approach:

> [28] When interpreting statutes, there must be proper regard to s 17A of the Interpretation Acts 1948 and 1967 (Act 188). It should not be and is in fact no longer a case of applying the literal rule first and only resorting to the purposive rule of interpretation when all else fails with the introduction of this purposive rule of interpretation into legislation, rendering this rule no longer a common law canon of interpretation but one with statutory force. This is clear from the line of authorities emanating from this court — see *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561; *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450; [2022] 4 CLJ 657; *AJS v JMH and another appeal* [2022] 1 MLJ 778; [2022] 1 CLJ 331; *Tan Kah Fatt & Anor v Tan Ying* [2023] 2 MLJ 583; [2023] 2 MLRA 525; *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829; [2023] 5 CLJ 167; [2023] 4 MLRA 114.
>
> [29] *These authorities remind us of a contextual construction within the purview or in accordance with the intent or object of the legislation, that is, the purposive rule of construction as statutorily enunciated in s 17A. The reading or meaning that the courts give to the provisions must promote and not stifle the object or intent of the legislation concerned.* In any event, it would be difficult to envisage an interpretation which runs afoul of the literal rule of interpretation just to accord with the purposive rule as legislation is written in accord and to facilitate the intent and purpose of the legislation, and not otherwise. (Emphasis added).

Our finding on the interpretation

[31] Based on the authorities above, we remind ourselves of the fundamental principle of statutory interpretation, that is, the words of a statute are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and the object of the statute, and the intention of the legislature. There can be mischief which is required to be cured by the statute, and this can be done by applying various norms and theories of interpretation which might go against the literal meaning at times.

[32] The purpose behind interpretation is to clarify the meaning of the words used in the statutes which might not be that clear. This is because the nature of drafting of the statute by the legislature does not always speak clearly and may be ambiguous such that it can be subject to different arguments of interpretation. Even if statutory language appears to be straightforward, questions of the meaning of the words may arise. The statutory interpretation involves making a choice between uncertainties that allow the judges to employ a variety of methods to find the message of the legislature and decide in specific cases what the law means.

[33] With those trite principles of law in mind, we proceeded to deal with the issue at hand, that is, what is the true meaning of the phrase 'construction contract made in writing' under s 2 of the CIPAA.

[34] First of all, we noted that there are numerous High Court decisions on this issue. As observed by the LHCJ and acknowledged by the learned counsel for the parties in their submission before us, almost all of the decided cases leaned towards an expansive interpretation of the phrase 'construction contract made in writing'. To name a few, in *Zana Bina*'s case Lee Swee Seng J (now JCA) held that an expansive and generous interpretation is to be given to the meaning of the phrase 'contract made in writing' in line with the purpose of CIPAA which is captured to some extent by its long title, in *Innovatif Engineering (M) v Nomad Engineering Sdn Bhd* 2017 AMR 722 (*Innovatif Engineering*'s case), Ravinthran Paramaguru J (now JCA) adopted the view that the phrase 'construction contract made in writing' ought to be given liberal meaning and should not be restricted only to a formal contract, in *Poly Ritz Ventures*' case, Lim Chong Fong J (now JCA) referred to *Inovatif Engineeering*'s case and opined that a purchase order, regardless of the fact that it could refer to another document or whether it is dated prematurely pending execution of another contract, is a written document comes within the meaning of the phrase 'contract in writing', and in *Ong Teik Beng*'s case, Amarjeet Singh JC (now HCJ) is in agreement with the liberal approach rather than the stringent approach, and that purchase orders and quotations can constitute a 'contract in writing'. See also Lee Swee Seng J decisions in *Terminal Perintis Sdn Bhd v Tan Ngee Hong Construction Sdn Bhd and another case* [2017] MLJU 242 and *Euroland & Development Sdn Bhd v Tack Yap Construction (M) Sdn Bhd* [2018] MLJU 861.

[35] Besides that, we also refer to our own decision in *Bina MYK Sdn Bhd v VVO Construction Sdn Bhd* [2017] MLJU 2080 (*Bina MYK*'s case) where it was agreed that the phrase 'construction contract made in writing' should be construed widely and to include written correspondences between the parties in relation to a construction contract. From the said decision, it is clear that this court endorsed or is in agreement with the High Courts' decisions in

interpreting the phrase 'construction contract made in writing'. The question is, whether there is any reason for us to depart from the said decision?

[36] As earlier mentioned, CIPAA defined the phrase 'construction contract' to mean a construction work contract or construction consultancy contract. Meanwhile, the phrase 'construction work' is also properly defined as earlier stated in para [11] above. What is left to be determined is the phrase 'made in writing'.

[37] To begin with, we look at the meaning of the word 'make'. According to Oxford Languages dictionary, the meaning of the word 'make' is as follows:

1. form (something) by putting parts together or combining substances; create,
2. cause (something) to exist or come about; bring about.

In a simple term, we can understand that the word 'make' means to make or assemble something or it can also mean to create.

[38] Next, we have to look at the phrase 'in writing'. Section 3 of the Interpretation Acts 1948 and 1967 defined the word 'writing' or 'written' as follows:

> 'writing' or 'written' includes typewriting, printing, lithography, photography, electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved.

From the definition, it is comprehensible that the phrase 'in writing' refer to the mode of recording of information or fixing information in a form capable of being preserved. We have to accept that the meaning of 'in writing' can differ based on how, when or where it is used.

[39] We are of the view that by combining the meaning of the words that form the phrase 'construction contract made in writing' it simply means that, a construction contract created either in typewriting (or even hand written), printing, lithography, photography, electronic storage or transmission or any other method of recording information or fixing information in a form capable of being preserved. As it involved a construction contract which is an agreement between two parties that creates an obligation to perform the construction work, it has to be a communicated to the other party made by hand or electronically, resulting in a permanent record or in a form that can be seen and provides proof of receipt and formally communicated through mediums either physically sent or by other means such as mail, email or electronic procurement systems where verification of the receipt is provided.

[40] From the above meaning of the phrase 'construction contract made in writing', can we say that it is only confined to a formal written contract? In answering the question, we have to remind ourself of the recent Federal Court decision in *Julian Chong Sook Keok*'s case which clearly pronounced that the reading or meaning that the courts give to the provisions of the law must promote and not stifle the object or intent of the legislation concerned, and in our case, the CIPAA. As to the *raison d'être* of CIPAA the Federal Court in *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224 (*Martego*'s case) made the following observation and findings:

> [46] At the risk of repetition, we say that the raison d'être of the CIPAA 2012 regime lie in facilitating and providing remedies for the recovery of payment in the construction industry. The CIPAA 2012, brings three major changes to the construction industry in Malaysia:
>
> (a) a 'right to progress payment', unless otherwise agreed to by the parties;
>
> (b) a speedy resolution through adjudication for construction disputes relating to payment for works carried out under the construction contract; and
>
> (c) a determination which has temporary finality. A party, which executes construction work and which is unpaid in whole or in part, under the construction contract may serve a payment claim on non-paying party to the construction contract.
>
> [47] From the preamble, it is clear that the CIPAA 2012 is 'an Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters.
>
> [48] The Explanatory Statement to the CIPAA Bill 2011 states as follows:
>
> ... EXPLANATORY STATEMENT
>
> The Construction Industry Payment Adjudication Act 2011 ('the proposed Act') seeks to *facilitate regular and timely payment* in respect of construction contracts and to provide for speedy dispute resolution through adjudication. The purpose of the proposed Act is to *alleviate payment problems that presently prevails pervasively and which stifles cash flow in the construction industry.* The proposed Act further provides default payment terms in the absence of provisions to that effect and prohibits conditional payment terms that inhibit cash flow. The act also seeks to provide remedies for the recovery of payment upon the conclusion of adjudication. (Emphasis added).
>
> (See: Explanatory Statement of CIPAA Bill 2011)
>
> [49] The speech by the deputy minister during the second reading of the bill to introduce the CIPAA 2012 in Dewan Rakyat on 2 April 2012 revealed that the raison d'être of the CIPAA 2012 is to resolve the payment problem and facilitate regular and timely payment, provide for speedy dispute resolution through adjudication:

A

12. Tuan Yang di-Pertua, industri pembinaan mempunyai potensi yang tinggi untuk terus berkembang. Antara cabaran yang perlu ditangani bagi mencapai aspirasi ini ialah *isu pembayaran yang melibatkan* pihak-pihak dalam rantaian pembinaan termasuk kontraktor utama, subkontraktor, sub-subkontraktor, para perunding dan pembekal-pembekal bahan-bahan. *Sekiranya masalah*

B

pembayaran ini tidak ditangani dengan berkesan, ia boleh menjejaskan *aliran tunai dan seterusnya menyebabkan kelewatan menyiapkan projek, kemerosotan kualiti kerja, peningkatan kos dan dalam kes-kes kritikal*, kontrak akan ditamatkan ...

C

Pendek kata, *tempoh masa yang lama dan kos prosiding yang tinggi* adalah merupakan antara *faktor utama yang mengekang pihak-pihak terlibat untuk merujuk pertikaian kepada mahkamah atau timbangtara. Justeru itu, kerajaan amat prihatian dengan isu pembayaran dalam industri pembinaan* dan telah menggubal Rang Undang-Undang Pembayaran dan Adjudikasi Industri Pembinaan 2011 bagi membantu pihak-pihak yang terlibat untuk

D

menyelesaikan pertikaian pembayaran dengan mudah, murah dan cepat. Rang undang-undang ini diwujudkan selepas diadakan beberapa siri perbincangan dan dialog bersama agensi kerajaan, penggiat industri, pihak-pihak yang berkepentingan atau stake holders dan badan profesional yang berkaitan.

...

E

Pertikaian yang boleh dirujuk kepada adjudikasi adalah berkaitan dengan pembayaran bagi kerja siap atau perkhidmatan yang dibekalkan, yang sepatutnya dibayar di bawah terma-terma nyata kontrak dalam kontrak pembinaan. Ia termasuklah bayaran interim mengikut kemajuan kerja. Prosiding adjudikasi boleh dimulakan sebaik sahaja timbul pertikaian

F

pembayaran sama ada semasa projek pembinaan sedang dijalankan atau selepas projek disiapkan ... (Emphasis added).

(See the Deputy Minister's Policy Speech in Dewan Rakyat and the summary of the speech by Mary Lim J (as she then was) in *Uda Holdings v Bisraya Construction Sdn*

G

Bhd & Anor and another case [2015] 5 CLJ 527).

[50] It can be clearly discerned from the Deputy Minister's speech that the CIPAA 2012 is enacted by the Parliament to provide an easily accessible, faster and cheaper resolution forum ie the adjudication. The following characteristics of the CIPAA 2012 is in tandem with the said intent:

H

(a) it involves tight time constraints. The deadline for each step is fixed and the timeline for each stage is relatively short to ensure that the disputes are resolved rapidly and quickly;

(b) it involves a significant degree of informality;

I

(c) it gives adjudicator's determination a degree of conclusiveness;

(d) it involves rights which are interim only. The rights and liabilities under the Act do not affect other entitlement a person may have under a construction contract or any other remedy a person may have for recovering such entitlement;

(e) the standard adjudicator's fee is introduced and the charges are cheaper than arbitration. Low-cost decision making is a core object of the scheme in the Act; and

(f) the grounds on which the court can rely upon to set aside the adjudicator's determination are limited. The court primary duty must be to uphold the adjudicator's determination and not to revisit the factual or legal matters canvassed before the adjudicator.

[51] It is clear, therefore, that the issue of cash flow is the primary objective of the CIPAA 2012 as it is deemed to be the life-blood of the construction industry. This position has been recognised by our courts.

...

[55] We have also perused and scrutinised the Preamble, the Explanatory Notes to the Bill and the speech of the Deputy Minister when tabling the CIPAA Bill. We have no hesitation in agreeing and endorsing the interpretation expounded by the High Court and the majority. It is clear from the materials mentioned above that the primary objective of the CIPAA 2012 is to alleviate cash flow issues by providing an effective and economical mechanism. The courts are consistent on the finding that the CIPAA 2012 is intended to alleviate cash flow issue. Therefore, the mischief that the CIPAA 2012 intends to cure is none other the cash flow in the construction industry through effective and economical mechanism; for deciding otherwise would run counter to the legislative purpose of creating an expedited adjudication process.

[41] Based on the ratio decidendi in *Julian Chong Sook Keok*'s case and raison d'être of CIPAA as observed in *Martego*'s case, we find that there is no reason for us to depart from our decision in *Bina MYK*'s case that 'construction contract made in writing' should be construed widely and to include written correspondences between the parties in relation to a construction contract. We also agree with the High Courts' decisions as mentioned in para [34] above which allows for an expansive, generous and liberal interpretation to be given to the meaning of the phrase 'construction contract made in writing'. To conclude, a claimant before the adjudicator should be allowed to prove their claim based on 'construction contract made in writing' which may include any written correspondences such as letter of award, or any other written documents that can prove the existence of a construction contract such as purchase orders and invoices.

ACC 03

[42] As regard to the status of the ACC 03, we refer to the High Court decision in *Zana Bina*'s case where the learned judge made the following observation and finding as regard to the ACC 03:

[55] This court finds the following guideline issued by KLRCA helpful with respect to whether there is a construction contract made in writing:

A Circular CIPAA 03 KLRCA's Guideline on the meaning of 'Construction Contract Made In Writing'

28 Apr 2014

The Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') B came into operation on 15 April 2014. Section 2 of the Act provides that statutory adjudication regime shall apply to construction contracts made in writing.

However, no definition or further elaboration is provided in the Act as to what 'construction contract made in writing' means.

C

Given the fact that there are various means by which a construction contract may be made, a clear guideline on the meaning of a 'construction contract made in writing' will ensure that parties to a construction contract are guided as to whether or not payment disputes arising under their contract can be referred to adjudication under the Act. Further, it will eliminate the need for the adjudicator D who may not be legally trained to grapple with the complexity of the issue of whether a construction contract is in writing.

As such the KLRCA is of the view that it would be expedient and/or necessary to provide clear guidance and definition as to what the phrase 'construction contract made in writing' mean, for giving full effect and the better carrying out E of the provisions of the Act.

The KLRCA adopts the following definition of a 'construction contract in writing': 'Construction Contract In Writing'

(1) There is a contract in writing:

F

(a) if the contract is made in writing (whether or not it is signed by the parties);

(b) if the contract is made by exchange of communications in writing; or

G

(c) if the contract is evidenced in writing.

(2) Where parties agree otherwise than in writing by reference to terms which are in writing, they make a contract in writing.

(3) A contract is evidenced in writing if a contract made otherwise than H in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the contract.

The KLRCA Guideline on Construction Contract in Writing shall apply to all adjudication cases commenced under CIPAA. A copy of the KLRCA Guideline can be found at: www.klrca.org.my

I

Dated 28th day of April, 2014.

Professor Datuk Sundra Rajoo Director of KLRCA

[56] Clearly an expansive and generous interpretation is to be given to the meaning of a 'contract made in writing' in line with the purpose of CIPAA which

is captured to some extent by its long title that reads:

> 'An Act to facilitate regular and timely payment, to provide a mechanism for speedy dispute resolution through adjudication, to provide remedies for the recovery of payment in the construction industry and to provide for connected and incidental matters'.

[57] It must be borne in mind that generally it is the Employer that would rely on the fact that there is no construction contract in writing to defeat or delay a Payment Claim for work done. The Claimant/Contractor on the other hand has a limited time frame to complete the works and it cannot be that if he does the work, he is damned if there is no concluded contract in that further documents are to be signed! Conversely, if he does not commence work, as in this case when completion date is from the date of site possession which had already been given, he runs the risk of late completion and be damned with LAD claims!

[58] When the Respondent here had every opportunity to stop the Claimant from starting the balance Works until those further Contract Documents are signed, it must mean that the Respondent had waived that requirement or is otherwise estopped from contending otherwise by their very conduct.

[43] We agree with the learned judge's finding in *Zana Bina*'s case that ACC 03 remains as a useful guideline to determine whether there is a 'construction contract made in writing' as required under s 2 of the CIPAA. On the same point, we also agree with the High Court decision in *MRCB Builders Sdn Bhd v SMM Resources Sdn Bhd and another case* [2021] MLJU 1795 that the circulars issued by AIAC are administrative and/or advisory in nature as those circulars are not subsidiary legislation. See also another High Court decision in *Ancubic Construction Sdn Bhd v Cedy Third Contracting and Trading (M) Sdn Bhd and another case* [2023] MLJU 1204.

[44] As to the submission by learned counsel for Intisari that the LHCJ has failed to appreciate that the ACC 03 does not have legal binding effect but only a mere guideline, we cannot find anywhere in the LHCJ's GOJ that she made a finding that ACC 03 is legally binding on the parties or the LA. Therefore, we find that there is no merit in the submission and the issue raised before us on legality of ACC 03 is actually a non-starter.

The second element — Construction contract must relate to construction work

[45] Having decided that a 'construction contract made in writing' may include the contemporaneous documents such as purchase orders and/or invoices issued and/or the conduct of the parties such as the part payment made under the contract, we are of the considered view that those contemporaneous documents and/or the conduct of the parties relied on should be conscientiously scrutinised and strictly interpreted to ensure that it conform or relate to a 'construction work'.

[46] Under CIPAA, a claimant before the adjudicator bears the burden to proof that his claim is under a construction contract related to 'construction work' which is exhaustively defined in s 4 of the CIPAA. At risk of repeating but for better reference, we once again reproduce the definition of 'construction work' under s 4 of the CIPAA as follows:

> 'construction work' means the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of —
>
> (a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;
>
> (b) any road, harbour works, railway, cableway, canal or aerodrome;
>
> (c) any drainage, irrigation or river control work;
>
> (d) any electrical, mechanical, water, gas, oil, petrochemical or telecommunication work; or
>
> any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation work, and includes —
>
> (A) any work which forms an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement,
>
> (B) earth-moving, excavation, laying of foundation, site restoration and landscaping; and
>
> (C) procurement of construction materials, equipment or workers, as necessarily required for any works described in paragraphs (a) to (e);

[47] From the said definition, it is obvious that a claimant must prove that the work done under the payment claim must be related to either construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition work of any building or other forms of building listed in paras (a) to (e) of the definition and also include any work related to the matters mentioned in paras (A) and (B) of the definition.

TUV's payment claim and adjudication claim

[48] TUV filed its payment claim dated 4 October 2021 via Form 1 under Schedule 1 of the CIPAA against Intisari. The amount claimed is in the amount of RM1,703,148.97. See common core bundle ('CCB') in encl 53 at pp 118–120. The basis of the claim as stated in para (a) of the payment claim is as follows:

The Non-Paying Party appointed the Unpaid Party as its sub-contractor for the works awarded by Aker Solutions Malaysia Sdn Bhd and Air Product Malaysia Sdn Bhd with the details as follows:

(i) Main Contractor 1: Aker Solutions Malaysia Sdn Bhd

Description of Project

Supply of manpower, equipment & consumables for NDT Inspection Services for Aker Solutions (M) Sdn Bhd at PFKZ Port Klang, Selangor.

(ii) Main Contractor 2: Air Products Malaysia Sdn Bhd.

Description of Project

Supply of manpower & equipment UTTG & MPI for Air Products Malaysia Sdn Bhd.

For the rest of the claim under paras (b) to (g) of the payment claim, its only deals with the matters on payment, the works done and the demand made against Intisari. Invoices and credit notes issued in the transactions between parties were attached as appendix 'TMSY1' and 'TMSY2'.

[49] It is pertinent to note that, upon receiving the payment claim from TUV and prior to the appointment of the LA, AIAC had voiced out its concerned as to the applicability of CIPAA in TUV's payment claim against Intisari. AIAC's concerned may be gathered from the answer given to TUV's solicitor via a letter dated 7 January 2022. For the purpose of our deliberation on the applicability of CIPAA, it is necessary to set out the letter in full as follows:

WE WONG & CO

A-1-29 IOI Boulevard,

Jalan Kenari 5,

Bandar Puchong Jaya,

47170 Puchong Selangor

[Your Ref.: 1000-2078]

Dear Sirs/Madams,

IN THE PROPOSED MATTER OF AN ADJUDICATION BETWEEN TUV SUD (MALAYSIA) SDN BHD (CLIAMENT) AND INTISARI MULIA ENGINEERING SDN BHD (RESPONDENT)

We refer to the above matter and to your letters dated 7th and 28th December 2021.

We stand by our AIAC Circular 03 dated 28th April 2014, but wish to highlight that the documents furnished to us by the Claimant towards establishing the

existence of an agreement between the Parties are in fact, documents evincing the arrangement between the Respondent and third parties not named in the adjudication proceedings.

Further, the invoices furnished to us issued by the Claimant to the Respondent, arises from an arrangement or a relationship that has not been documented in writing, as required under CIPAA. Moreover, by the Claimant's own letter dated 7th December 2021, it has been indicated that '*There is no main contract or supplemental agreement for all the works subcontracted by the Respondent to the Claimant. All works are performed by the Claimant in accordance with the instructions given by the Respondent from time to time. As such, there is no fixed value of works'.*

It is for the above-mentioned reasons that we are conscious of the exclusions in CIPAA 2012 in proceeding with the registration of these adjudication proceedings. Notwithstanding this, and having already highlighted our concerns in proceeding with the above matter, if the Claimant is minded to proceed with the registration, we are content to leave this matter to the determination of the adjudicator when so appointed. For the avoidance of doubt, the Claimant is put on notice that its proceeding in this matter, including, vide any Request to the Director of the AIAC to appoint an adjudicator (Form 5) and continue thereafter, is strictly and solely at their own risk.

For all future exchange of correspondence and service of documents in this matter, please cite the case reference number: AIAC/ADJ/PFC-1230-2021 until notified otherwise by AIAC.

As the Case Counsel assigned to this matter, all case related enquiries pertaining to this matter should be directed to the undersigned.

Thank You

Yours faithfully

AHMAD HANIFFITRI

[50] Then, TUV's solicitor replied to AIAC letter on 11 January 2022 to confirm TUV's intention to proceed with registration of the claim and to leave to the LA to determine on the issue of whether TUV's claim falls within the ambit of the CIPAA and whether the LA has the power to decide on the claim. TUV's solicitor additionally informed that it will present the relevant documents to the LA to show the parties' arrangement in writing.

[51] Even though The LA was reminded by AIAC that there is no contract in writing between TUV and Intisari, the LA proceeded to accept the appointment to hear TUV's payment claim. The letter of acceptance dated 17 February 2022 is at pp 126–127 of the CCB in encl 53.

[52] Intisari through its solicitor's letter dated 1 March 2022 AIAC had raised objection, on the dispute being heard by an adjudicator based on the

reason that the parties have not signed any formal contract with regards to TUV's appointment as its sub-contractor. See CCB in encl 53 at p 129.

[53] However, TUV was adamant and proceeded to file the adjudication claim under s 9 of the CIPAA via Form 7 dated 7 March 2022. See CCB in encl 53 at pp 131–137. Again, as to the nature of its contracts with Intisari, TUV repeated what was stated in its payment claim. Paragraph B of the adjudication claim is as follows:

> B. The Construction Contracts
>
> 3. The Respondent appointed the Claimant as its sub-contractor for the works awarded by Aker Solutions Malaysia Sdn Bhd and Air Products Malaysia Sdn Bhd.
>
> 4. In respect of the construction works awarded by Aker Solutions Sdn Bhd ('Main Contractor 1') to the Respondent, which the Respondent appointed the claimant as it sub-contract, the description of the project is:
>
> > Supply of manpower, equipment & consumables for NDT Inspection Services for Aker Solutions (M) Sdn Bhd at PFKZ Port Klang, Selangor.
>
> 5. In respect of the construction works awarded by Air Products Malaysia Sdn Bhd. ('Main Contractor 2') to the Respondent, which the Respondent appointed the claimant as it sub-contract, the description of the project is:
>
> > Supply of manpower & equipment for UTTG & MPI for Air Products Malaysia Sdn Bhd.

All relevant documents such as the invoices credit notes were attached in Schedule 1 to 5 of the adjudication claim.

[54] Later, in his AD the LA made a finding that TUV's claims against Intisari were based on two purchase orders and other supporting documents such as the invoices, which created two contracts in writing namely, contract No 1 — supply of manpower, equipment and consumables for NDT inspection services for Aker Solutions (M) Sdn Bhd in PFKZ Port Klang, Selangor; and contract No 2 — supply of manpower and equipment for UTTG and MPI for Air Products Malaysia Sdn Bhd. In Pulau Indah, Selangor. At the end of the proceedings, the LA decided to allow the entire amount claimed by TUV's against Intisari.

Had TUV proven the first and second element?

[55] The critical question is, had TUV properly procured the AD as decided by the LA to deny Intisari's application to set aside the AD under s 15 of the CIPAA? To answer the question, we have carefully perused the appeal records and sieved through the documents tendered in the proceedings before the LA. Upon sieving and analysing the documents in the appeal records, we come to

an irresistible conclusion that TUV had not adduced an iota of evidence to show that the outstanding sums claimed against Intisari are based on the so-called 'construction contracts' and are related to 'construction work' within the meaning of s 4 of the CIPAA.

[56] We reiterated our view that the court must be strict in interpreting any documents used to prove the existence of a contract where there is no formal contract in writing entered into between the parties. We further stress that the interpretation should only be confined to the words used in the documents.

[57] In the AD, the LA found that TUV's claim were founded on the purchase order dated 22 May 2018 for contract No 1 and for contract No 2, the purchase orders dated 21 July 2020 and 7 March 2020 where the location of the contracts were in Port Klang and Pulau Indah respectively. See para 6 of the AD in ikatan khas in encl 44 at p 3. However, we find that it was not mentioned anywhere in the AD that the supply of manpower, equipment and consumables for NDT Inspection Services to Aker Solutions (M) Sdn Bhd under contract No 1, or supply of manpower and equipment for UTTG and MPI to Air Products Malaysia Sdn Bhd under contract No 2 were related to 'construction work' as defined under s 4 of the CIPAA.

[58] On this point, we are well aware of the provision of the law that in construing the meaning of 'construction work', it will include the procurement of construction materials, equipment or workers, as necessarily required for any works, but those procurement of materials, equipment or workers must be related to the 'construction work' as defined under s 4 of the CIPAA. From the evidence adduced such as the purchase orders, invoices or debit notes, or even from the correspondences via letter or email, none of them described the nature of 'construction work' involved in the so call contracts between TUV and Intisari.

[59] From the plain reading of the description of the project for contract No 1 as stated by the LA in his AD, it merely shows that the contract is for the supply of manpower, equipment and consumables for NDT inspection services for Aker Solutions (M) Sdn Bhd at PFKZ Port Klang, that's all. There was no mention at all about the nature of works involve in the sub-contract between TUV and Intisari or at least the nature of works given to Intisari by the employer, Aker Solutions (M) Sdn Bhd. For our understanding, since there is no explanation in the records of proceedings before the LA, we did make a search for the meaning of 'NDT inspection services'. We found that NDT stands for non-destructive testing, which is a form of material/component testing method without involving any form of destruction, damaging or altering the structure of the material. NDT applications are widely used in the oil and gas, manufacturing, shipping, aerospace, railroad and power plant

sectors. See the Department of Skill Development under Ministry of Human Resource website at 'https://www.dsd.gov.my/en/service/non-destructive-testing-ndt'. Then, the question is, what was the supply of manpower, equipment and consumables for? If the answer is that they are for NDT inspection services for Aker Solutions (M) Sdn Bhd, the next question is, did the NDT inspection services involve construction work? All these questions were not properly addressed by the LA in order to determine whether contract No 1 was related to 'construction work' to trigger the application of the CIPAA.

[60] The same goes to the contract No 2, where the description of the project only refers to the supply of manpower and equipment UTTG & MPI to Air Products Malaysia Sdn Bhd, at Pulau Indah. From our research, both acronyms in the description refer to methods in NDT where UTTG stand for ultrasonic thickness gauge and MPI stand for magnetic particle inspection. No further evidence or information was given by TUV to prove that the supply of manpower and equipment under contract No 2 related to 'construction work'.

[61] The LA may use his knowledge to acknowledge the nature of work in the 'NDT inspection services' supplied by TUV to Intisari under the contracts, but he cannot presume or put himself in the state of guessing in determining the question of fact which is not before him. The question of fact on whether the supply of services by TUV to Intisari under the contracts were related to 'construction work' is pertinent to the fact in issue. The LA must be in a situation that, from the evidence adduced before him, he is not in doubt that the services supplied by TUV to Intisari are related to 'construction work' listed in the definition under s 4 of the CIPAA. In other words, the LA must be certain of all the material facts to ensure that he is clothed with jurisdiction to hear and decide on TUV's claim.

[62] From our analysis above, we find that TUV failed to prove both elements required under s 2 of the CIPAA to clothe the LA with jurisdiction to hear TUV's claim against Intisari. Even though we agree that the courts can take an expansive, generous and liberal approach in interpretating the meaning of the phrase 'construction contract made in writing' for the first element, TUV has to discharge the burden of prove that the contracts entered with Intisari do exist and the said contracts are 'construction contracts' per se. Then, for the second element, TUV has to prove that the 'construction contracts' are related to 'construction work'. From the evidence adduced before the LA in the adjudication proceedings, we are of the considered view that there is no proper proof brought by TUV in order to invite the applicability of CIPAA as regards to TUV claims.

[63] Based on the said finding, we find that TUV had improperly procured the AD since the LA has acted in excess of his jurisdiction. On the issue of jurisdiction, we agree with the LHCJ's observation in her GOJ at para [36] as follows:

> It is well established that matters of jurisdiction, whether the total lack or excess of an adjudicator's jurisdiction, may be raised before or after an adjudication decision has been made. It is immaterial that the complaint of lack or excess of jurisdiction was not raised during the adjudication proceeding. Even if the adjudicator makes a finding on his own jurisdiction, his decision is open to scrutiny by the court. This is because the adjudicator's decision on his own jurisdiction is not binding and nor is it conclusive in any way (see *Construction Adjudication In Malaysia*, 3rd Ed, Sweet & Maxwell, 2022 by Lam Wai Loon and Ivan YF Loo at p 431 and the cases cited in the footnotes including *Giatreka Sdn Bhd v SGW Engineering Construction Sdn Bhd and another appeal* [2019] MLJU 1477; [2020] 1 AMR 193, *Dekinjaya Builder Sdn Bhd v Chong Lek Engineering Works Sdn Bhd and another case* [2020] MLJU 2455, *SS Builders Sdn Bhd v Darma Mekar Sdn Bhd* [2020] MLJU 1147, *EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd and another case* [2020] 11 MLJ 353 and *Ahmad Zaki Sdn Bhd v Swaja Fascade Sdn Bhd & Anor* [2019] MLJU 1224).

Thus, as far as the matters involved the jurisdiction of the LA, whether the total lack or excess of jurisdiction, it can be raised either in the adjudication proceeding itself or, in the enforcement or setting aside application before the High Court, or even raised for the first time in further appeal to the Court of Appeal.

OTHER GROUNDS OF APPEAL

[64] In light of our views above, we find it unnecessary to deal with the other grounds raised in para(c) and the second part of para (d) of the MOA.

CONCLUSION

[65] For all the above analysis and reasons given, we find merits in Intisari's appeal, which warrants appellate intervention. We are therefore unanimous in allowing Appeal 539 and hereby set aside the High Court order dismissing Intisari's setting aside application and the LA's AD to allow TUV's claim.

[66] Following from that, consequentially, we allow Appeal 538 and hereby set aside the High Court order allowing TUV's enforcement application.

[67] As to cost, we take note of the risk taken by TUV in pursuing its claim against Intisari even though it was fairly reminded by AIAC via its letter dated 1 July 2022. For better reference, we produced again para 5 of the said letter as follows:

> It is for the above-mentioned reasons that *we are conscious of the exclusions in CIPAA 2012 in proceeding with the registration of these adjudication proceedings*. Notwithstanding this, and *having already highlighted our concerns in proceeding with the above matter*, if the Claimant is minded to proceed with the registration, we are content to leave this matter to the determination of the adjudicator when so appointed. *For the avoidance of doubt, the Claimant is put on notice that its proceeding in this matter, including, vide any Request to the Director of the AIAC to appoint an adjudicator (Form 5) and continue thereafter, is strictly and solely at their own risk*. (Emphasis added.)

Based on the risk taken, it is fair to order TUV to bear the entire cost in the adjudication proceedings including the LA's fee and expenses.

[68] As to the appeals before us, we order costs in the sum of RM20,000 here and below to be paid by TUV to Intisari for Appeal 539, subject to allocator.

[69] As agreed by counsel for Intisari, we make no order as to cost for Appeal 538.

Both appeals allowed; decision of High Court set aside.

Reported by Ashok Kumar